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RESEARCH ARTICLE / ARTICLE DE RECHERCHE

The Legitimation of Criminal Deportation*

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Abstract

This article presents a sociolegal study of decisions by a Canadian immigration tribunal on appeals for "humanitarian and compassionate" relief from criminal deportation. Drawing on the work of Émile Durkheim, we argue that the appeal decisions serve two legitimating functions. On the one hand, they seek to demonstrate the state's capacity to ensure that the large-scale admission of mostly economic immigrants does not threaten the solidarity of Canadian society. On the other, the decisions address concerns about the justifiability of deportation by making vivid the moral incompetence of unsuccessful appellants, hence their unsuitability for membership.

Keywords: immigration law; deportation; criminality; Émile Durkheim; social morality; division of labour

Résumé

Cet article présente une étude sociojuridique des décisions prises par un tribunal canadien d'immigration en appel de décisions pour « motifs d'ordre humanitaire » suivant une mesure de renvoi fondé sur une déclaration de culpabilité au Canada. Sur la base des travaux d'Émile Durkheim, nous soutenons que ces décisions en appel remplissent deux fonctions de légitimation. D'une part, ces décisions tentent de faire la démonstration de la capacité de l'État à veiller à ce que l'admission à grande échelle d'immigrants, principalement des immigrants économiques, ne menace pas la solidarité de la société canadienne. D'autre part, ces décisions répondent aux préoccupations concernant la justification de la

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mesure de renvoi en mettant en évidence l'incompétence morale des requérants déboutés et donc leur inaptitude à devenir membres de la société canadienne.

Mots-clés: droit de l'immigration; déportation; criminalité; Émile Durkheim; morale sociale; division du travail

I. Introduction

Canada first made "humanitarian and compassionate" relief from deportation available in 1967 (Kelley and Trebilcock 2010, 371; Anderson 2012, 185). Ever since, such relief powers have survived multiple rounds of reform and periodic surges in anti-immigration sentiment. This article presents an exploratory study of decisions by the Immigration Appeal Division (IAD), an administrative tribunal within the Immigration and Refugee Board, on humanitarian and compassionate appeals by "permanent residents"[1] who are facing deportation for "serious criminality." Our objective is to take steps toward a broader socio-legal understanding of why humanitarian and compassionate relief powers endure and how they are applied.

The study is exploratory in two senses. First, it is based on a small sample. We examined fifty-two IAD decisions randomly selected from a total of 400 appeals dating from June 19, 2013 to June 28, 2020 that were available on LexisNexis-Quicklaw. The start date corresponds to the coming-into-force of legislative amendments that added new limits on the right of appeal to the IAD; the end date is when research began. Appeal decisions were coded in NVivo by following "informed grounded theory", a methodology in which codes emerge from the text, albeit drawing on ongoing literature reviews, with an eye on the inductive development of a theoretical account (Charmaz 2014; Thornberg 2012). The two authors first independently coded small numbers of the same cases line by line over three rounds. After each round, they compared results. Through this process, they developed a preliminary codebook. The codebook was then applied to and refined through the coding of additional rounds of cases, now with help from a research assistant. This iterative process of coding continued, with ongoing modifications to the codebook, until saturation was reached, meaning that no new codes were emerging from the data (Moser and Korstjens 2017). At that point, the three coders went back and recoded cases from earlier rounds to ensure consistency.

The study is further exploratory in that, in developing a provisional theory, the authors chose to investigate the explanatory and critical potential of a set of ideas drawn from the work of Émile Durkheim. Some tendencies that seemed salient in the IAD's decisions were: their moral mode of justification; a structure of analysis that, among other things, balances the "seriousness" of appellants' offences against their economic "establishment"; and a marked trend toward dismissing appeals.[2] Recourse to Durkheim to interpret these tendencies seemed

[1] "Permanent residents" are admitted indefinitely into Canada, enjoy statutory rights of entry, are subject to fewer grounds of inadmissibility, and may become eligible for citizenship.

[2] Most appeals in our sample were dismissed (thirty-one of fifty-two, or 59.5%). Six appeals (11.5%) were allowed outright. Fifteen (29%) resulted in stays of removal.

apt because he placed moral sentiments at the core of a sociological project that was concerned with how societies maintain "solidarity," in part through their response to criminality, despite the rise of an individualistic ethics and the dominance of market relations. As such, the authors felt that a Durkheimian interpretation of the IAD's decisions might shed light on the phenomenon of criminal deportation from a capitalist society that espouses liberal and democratic values. According to our Durkheimian interpretation, the IAD's decisions articulate, and seek to reinforce, ideals of social morality and membership determined by a capitalist division of labour that also shapes the country's immigration policy. On this interpretation, evaluations of moral competence, understood as the ability to live in a manner consonant with such ideals, mark appellants as members, potential members, or nonmembers of society. By representing decisions about criminal deportation as grounded in such evaluations, the IAD's decisions seek to shore up the legitimacy of Canadian migration control laws, policies, and practices. As we will see, however, the Durkheimian interpretation also provides reason to think the legitimation challenges confronting the IAD cannot be overcome.[3]

We hope this account is compelling, yet we stress that it is partial and provisional. It highlights but one strand of rationality—a moral one—that runs alongside others, such as risk-based and economic-utilitarian rationalities, in these nuanced artifacts of the state's coercive power over migration. Section II begins by situating the IAD's humanitarian and compassionate relief powers within Canadian migration control law, policy, and practices. Section III then elaborates on two legitimation concerns that arise under that law and policy, about large-scale economic admissions and patterns of discriminatory exclusion, as well as three questions flowing from those concerns. Sections IV to VI address those questions. Section IV explains how Durkheim's theory of punishment may be extended to explain both deportation for criminality and the possibility of humanitarian and compassionate relief. Section V further employs Durkheim's account of two kinds of solidarity to explain the dominant legal test applied in humanitarian and compassionate appeals. Section VI concludes with a discussion of the legitimation work done by the IAD's decisions.

II. Situating Humanitarian and Compassionate Appeals

Until a little more than sixty years ago, the twin goals of Canadian immigration policy—economic growth and nation-building—led to selection policies based on a joint concern with national origin, a proxy for race, and moral character (Valverde 2000, 109–10; Strange and Loo 1997; Kelley and Trebilcock 2010). Beginning in 1962, successive Canadian governments purged immigration law and policy of such criteria, now seen as invidious. Instead, they committed to the admission of ever-greater cohorts of immigrants mostly based on their ability to become "economically established."[4] The overriding goal of Canadian

[3] We thank a reviewer for this formulation.

[4] *Immigration and Refugee Protection Act* (*IRPA*) (2001), s 12(2). Economic-class admissions accounted for 255,660 individuals, or 58.4 percent of the overall admissions of permanent residents in 2022. This

immigration policy today can therefore be glossed as capitalist nation-building (Kaushal 2019). This policy goal is carried out through an array of increasingly specialized programmes, rationalized to the point of automation by using an online, points-based system called Express Entry. The flipside to this policy of high-volume yet carefully tailored economic admissions is inadmissibility and related enforcement practices, including deportation, based on grounds such as criminality. Enforcement provides second-order support to Canada's largely economic immigration goals (Cox and Posner 2007).

This instrumentally-rational picture of Canadian immigration law and policy is complicated somewhat by family class admissions, perhaps more so by refugee protection.[5] Our focus, however, is on the tension between this picture and the many discretionary powers within the *Immigration and Refugee Protection Act* (*IRPA*) and its regulations that require or permit officials to consider exempting noncitizens from the statute's ordinary rules on "humanitarian and compassionate" grounds. Most far-reaching is section 25 of the *IRPA*, which grants the Minister of Immigration, Refugees, and Citizenship power to exempt a foreign national "from *any* applicable criteria or obligations" (emphasis added) based on "humanitarian and compassionate considerations," including the best interests of any directly affected children. Apart from the overarching power in section 25, as well as a similar power that may be exercised on the minister's initiative under section 25.1, humanitarian and compassionate relief powers are available in appeals before the IAD (*IRPA*, ss 67(1)(c), 68(1), 69(2)) and as relief from permanent resident residency requirements (*IRPA*, s 28(2)(c)).[6] Some of these powers have been circumscribed over time, yet it remains the case that every grant of humanitarian and compassionate relief potentially runs counter to the economic and enforcement instrumentalities of Canada's immigration law and policy; at the very least, they cannot straightforwardly be explained according to such instrumentalities.

The IAD's appeal decisions, unlike most humanitarian and compassionate decisions, are publicly available. They therefore provide a window into humanitarian and compassionate decision-making, specifically the way in which it is deployed in the context of criminal inadmissibility and deportation. As set out in paragraph 36(1)(a) of the *IRPA*, inadmissibility for "serious criminality" captures both "permanent residents" and "foreign nationals"[7] who have either been convicted in Canada of crimes punishable by at least ten years' imprisonment or received a custodial sentence in Canada of more than six months.[8] Permanent

was the most recent year for which statistics are available (Annual Report to Parliament on Immigration (2023)).

[5] Family and refugee classes are largely structured, respectively, around relationships and risk, rather than economic potential (*IRPA*, ss 12(1), (3)).

[6] There is one more such power in the associated regulations (*Immigration and Refugee Protection Regulations* (2002), s 233) and three instances of "compassionate" discretion in the closely associated *Citizenship Act* (1985) (ss 5(3), 9(2), 22(1.1)).

[7] The category of "foreign national" encompasses everyone who is neither a permanent resident (*supra* note 1) nor a citizen.

[8] Paragraph 36(1)(a) of the *IRPA* applies to convictions in Canada; paragraphs 36(1)(b) and (c) cover convictions abroad or crimes that are committed abroad without a conviction. Appeals in our sample all dealt with paragraph 36(1)(a).

residents, but not foreign nationals, subject to a removal order on the grounds of serious criminality have a right to appeal to the IAD if they received a non-custodial sentence or a custodial sentence of less than six months (*IRPA*, ss 63(2), 64(1) and (2)).[9] The IAD may allow the appeal if they find that the appellant's acts do not fall substantively within paragraph 36(1)(a) or because of a procedural failing (*IRPA*, ss 67(1)(a) and (b)). However, the focus is almost always[10] on whether, "taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case" (*IRPA*, ss 67(1)(c), 69(2)).[11] IAD members may also issue a stay of removal on the same basis (*IRPA*, s 68(1)).

The power to deport is conceived, in case law, as an incident of a broad discretionary power over migration control (Kaushal 2023; Kanstroom 2007; Gibney 2013) that the Supreme Court of Canada has called "[t]he most fundamental principle of immigration law" (*Chiarelli* 1992, 733). Given the breadth of this power, humanitarian and compassionate relief has been described by the Supreme Court of Canada as a "discretionary privilege" (*Prata* 1976, 377) granted in response to "a plea to the executive branch for special consideration" (*Chieu* 2002, para 64). What is striking is that Parliament requires that this discretionary privilege be granted based on a moral–sentimental judgment grounded in a poorly understood domain of morality (humanitarianism) and a correspondingly obscure moral emotion (compassion). The IAD and its predecessor, the Immigration Appeal Board, have given structure to this mandate through a pair of legal tests. More encompassing but less common is *Chirwa* (1970), according to which humanitarian and compassionate relief is warranted whenever the facts of a case "would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another" (*ibid*., para 27). *Chirwa* was cited eight times in our sample, always together with *Ribic* (1985), the leading case. *Ribic* requires the examination of a series of factors: the seriousness of the offence; the possibility of rehabilitation; the length of time in Canada and the degree of establishment; family and community support; hardship to the appellant and dislocation to their family.[12] The logic seems to be—almost has to be—that the *Ribic* factors are those that, in appropriate combination, would trigger "a desire to relieve the misfortunes of another" in a "reasonable [person] in a civilized community." It is unclear how the *Ribic* factors guide such moral–sentimental judgment and how this judgment fits within the general economic rationality of Canada's immigration laws and policies. We argue in the next section that, to answer that question, we must grasp the legitimation challenges confronting Canadian migration control.

[9] Prior to the *Faster Removal of Foreign Criminals Act* (2013), the threshold was two years. This legislative change set the start date of our sample.

[10] Only one case in our sample considered either s 67(1)(a) or (b): SM, [2016] IADD No 941.

[11] *IRPA*, s 69(2) applies to ministers' appeals. No cases in our sample were ministers' appeals.

[12] These factors were later affirmed by the Supreme Court (*Chieu* 2002).

III. Two Legitimation Challenges and the Role of Deportation

Several authors explain developments in the laws, policy, and practices of migration control in Canada and elsewhere in terms of the quest for sociological legitimacy, implicitly framed as acceptance by citizens (Simmons and Keohane, 1992; Boswell 2007; Paquet and Larios, 2018). The discussion in the previous section suggests one legitimacy challenge: capitalist nation-building through immigration now operates without admissions criteria or inadmissibility categories that once targeted "polluting" traits (such as race or "moral turpitude") (Douglas 1995 [1966]). Their absence gives rise to a concern among policymakers about the possibility of a backlash against immigration (Simmons and Keohane 1992, 438). One may put this concern in more creditable terms. Many philosophical accounts defend the right to control migration (i.e. *Chiarelli*'s "fundamental principle") as a means of self-determination with the aim of preserving "communities of character" (Walzer 1983, 62) or "national identity" (Miller 2016, 59–63), as well the social trust that sustains support for entitlement schemes aimed at distributive justice (Miller 2005). The economic sphere, however, is often conceived as fuelling the "dissatisfaction and selfish interests" that inhibit "solidarity" (Honneth 2021, 38)—the condition of "lead[ing] the same moral life together" (Durkheim, Lukes, and Halls 2014 [1984], 18). Immigration policy aimed at capitalist nation-building might therefore be self-defeating. The dominance of economic-based admissions may turn Canada into an aggregate of "deracinated men and women" (Walzer 1983, 39) rather than a society as such.

One legitimation challenge presented by Canadian immigration law and policy, then, is that of staving off potential backlash to large-scale economic admissions—a backlash that might manifest as xenophobic or racist, but might also express a desire to preserve solidarity. At the same time, enforcement mechanisms that seemingly respond to backlash worries give rise to their own legitimation concerns, oriented toward both citizens and noncitizens, owing to the significant hardships that attend deportability (De Genova 2002; Sigona 2012; Benslimane and Moffette 2019), detention (Pratt 2005; Bosworth 2014), and deportation (Kanstroom 2012; Golash-Boza 2015). More pointedly, the imposition of these hardships seems to track distinctions of race (forty-eight out of fifty-two appellants in our sample, or 92%, were nationals of non-White majority countries), class (thirty-five of fifty-two appellants, or 67%, were either unemployed or working in unskilled jobs), and gender (forty-six of fifty-two appellants, or 88.5%, were men). Most pointedly, we might ask why the deportation of permanent residents but not citizens for criminality should not be considered unjustifiably discriminatory under the Supreme Court of Canada's equality jurisprudence (*Andrews* 1989; *Sharma* 2022) or an unjustifiable infringement of permanent residents' right to liberty or security of the person (*Canadian Council of Refugees* 2023).

Canadian immigration law and policy, then, face twin legitimation challenges that point to a tension between competing values. On the one hand, we find the imperative of sustaining acceptance by the "Canadian" public of large-scale economic admissions; on the other, that same public, to say nothing of the

noncitizens who are subject to immigration enforcement, must be assured that such policies are consistent with liberal values of equality and liberty. The secondary literature on deportation and other aspects of immigration law enforcement, overwhelmingly critical in nature, stresses this second set of legitimation challenges. This literature emphasizes the overlap of crime and migration control in some countries and analyzes that overlap through the rubric of "membership theory" (Stumpf 2006; Legomsky 2007). In one version, Juliet Stumpf argues that individual rights and associated privileges are limited to parties to a social contract between the government and the people (Stumpf 2006). It seems to follow that the telos of immigration enforcement is the separation of members from nonmembers: "Rather than desert or rehabilitation, famously targeted at the 'soul', the punishment of foreigners seeks to return people to where they 'belong'" (Bosworth, Franko and Pickering 2018, 42; see also Kaushal 2023, 356).

Such views raise three questions to be addressed in the balance of the article: (1) Why does this telos of separating members from nonmembers arise when noncitizens offend, and how is it distinct from the telos of criminal punishment? (2) How is membership, potential membership, or nonmembership constructed in cases in which they are contestable? (3) How does the logic of membership address the twin legitimation challenges discussed in this section? Chan, in an analysis of 177 IAD decision summaries that predate the *IRPA*, concluded that "deportation is as much about the expulsion of 'undesirable' immigrants as it is about making 'good' citizens given that many more immigrants are investigated for deportation than are deported" (Chan 2005, 154).[13] We agree that the IAD's decisions discursively construct noncitizen appellants as either members or nonmembers, with corresponding valences of moral goodness and badness, although we do not draw conclusions about their efficacy in shaping appellants' subjectivities. Rather, aiming to answer the three questions above, we turn to Durkheim's theory to elaborate on how the IAD's decisions contribute to the legitimation of Canadian migration control.

IV. The Telos of Criminal Deportation: Deportation and the Passions

Durkheim was long viewed ("typecast": Dean 1994, 146) as a conservative theorist of order. Such readings elicit the worry that Durkheim's theory may provide insufficient resources to critique the IAD's decisions. To some extent, as we discuss in the conclusion, this concern may be borne out. A Durkheimian interpretation of the IAD's decisions may force us to confront whether criminal deportation reflects a tension that is inherent in the project of constructing a society in which a group of persons "lead the same moral life together." However, there is also now a rich body of literature which demonstrates that Durkheim's work provides a powerful source of criticism, as Durkheim held that

[13] For other studies of the IAD, see Mujuzi (2017), as well as Janzen and Hunter (1969). Dauvergne (2005), Guilbault (2018), and Delisle and Nakache (2022) address humanitarian and compassionate decision-making more generally.

solidarity is possible in societies characterized by an advanced division of labour only if those societies are also just, in the sense of having eliminated "external inequalities" (that is, inequalities not based on natural talents) (Durkheim, Lukes, and Halls 2014 [1984], 302; Rawls 2003; Sirianni 1984).[14] As we also discuss in the conclusion, this more critical Durkheim leads to quite a different understanding of the IAD's decisions, allowing us to recognize their attempts at legitimation while at the same time noting the manner in which such attempts fall short.

The starting point for our Durkheimian analysis of the IAD's decisions is the theory of punishment that can be found in *The Division of Labour in Society* (Durkheim, Lukes, and Halls 2014 [1984]) and later work (Cotterrell 1999, 66). The theory holds that punishment, rather than a rational strategy aimed at reducing incidents of crime, represents a collective passionate reaction to the violation of determinate moral norms that lie at the core of the *conscience collective*, Durkheim's term for the set of moral beliefs and sentiments shared by a society's "average" members and "diffused over society as a whole" (Durkheim, Lukes, and Halls 2014 [1984], 63). The indignation expressed through punishment reaffirms a commitment to violated moral norms (ibid., 79; Durkheim 1973, 303). Durkheim insisted that failure to muster such a response would be demoralizing: weakening the shared moral commitments necessary for a group to continue to be a "society" of any sort (Durkheim, Lukes, and Halls 2014 [1984], 79, 234–35; Durkheim 1961, 166; Durkheim 1973).

The moral mode of justification employed by the IAD supports the view that the Durkheimian account of punishment plausibly transfers to deportation for criminality. Crime, ideal-typically, draws "honest consciousnesses together, concentrating them" (Durkheim, Lukes, and Halls 2014 [1984], 79; Cotterrell 1999, 75). Punishment in turn "consists of a passionate reaction graduated in intensity" to the violation of a norm (Durkheim, Lukes, and Halls 2014 [1984], 71). If so, deportation for criminality ceases to be a separate phenomenon, figuring instead as a continuation of the punitive process. Therefore, contrary to the dominant strand in the literature discussed above, an extension of Durkheim's theory suggests that there is no distinctive telos that is aimed at separating members from nonmembers when it comes to the criminalization of noncitizens (thus answering the first question from the previous section). All punishment has an exilic tendency (Mead 1918, 587; Garland 2013; Carvalho and Chamberlen 2018, 225). The perception that someone has committed an offence signals that they, regardless of formal status, do not belong to the society of persons sufficiently committed to the core norms of the *conscience collective.* Criminal trials and imprisonment externalize the internal, psychological reality of nonmembership. Deportation carries on this process for noncitizens.[15]

[14] For recent discussions of Durkheim's critical potential, noting commonalities between his thought and Hegel's, see Honneth (2021) and Neuhouser (2023).

[15] We therefore follow Kanstroom (2007, 19), Carvalho and Chamberlen (2018, 228), and Prabhat (2020) in suggesting that Durkheim's theory may illuminate the treatment of noncitizens—or, in Prabhat's case, the cancellation of citizenship—in some contexts, including deportation for criminality. That said, we do not argue here that Durkheim would have seen deportation as punishment. Any such argument would have to explain other grounds of inadmissibility and deportation, such as

A Durkheimian account therefore suggests one way of understanding the IAD's decisions: as articulations of a passionate response to criminal wrongdoing. So, in one example, the IAD condemns an appellant's blindness to the wrong of credit-card theft: "I am particularly troubled by the appellant's description of the credit card theft and subsequent spending sprees as being 'for fun.' I rather doubt that it was much fun for the victims; perhaps 'highly disturbing' would be a more apt description."[16] In a second, the criticism is directed at an appellant's failure to perceive the seriousness of charges of possession of a prohibited weapon and uttering threats:

> He stated that when police arrived he was found in possession of the brass knuckles because he had merely picked them up where his associate had dropped them. That makes negligible difference. His focus on that distinction shows [...] a failure to appreciate that the mere presence of brass knuckles, and making a house call for intimidation and threats, are abnormal in and of themselves.[17]

And, in a third, at an appellant's fraudulent receipt of social assistance and failure to pay taxes:

> During all of those years, the appellant received social assistance benefits while working under the table. During all of those years, he broke a wide array of laws. [...] [H]e admitted that he knew that he was breaking the law by working and not declaring it. He therefore did it knowingly. For someone who claims to love Canada, the security, the educational services, social assistance and freedom to live here, it must be noted that the appellant has not done his fair share in terms of taxes.[18]

On our Durkheimian interpretation, such passages are intended to reflect, and evoke, indignation as the proper collective response to criminal wrongdoing by noncitizens (Durkheim, Lukes, and Halls 2014 [1984], 78).

Several qualifications are needed. First, Durkheim's theory insists on the necessity for punishment "to maintain inviolate the cohesion of society" (Durkheim, Lukes, and Halls 2014 [1984], 83; see also Durkheim 1961, 167). It might seem to follow that Durkheim would also endorse criminal deportation as necessary, thereby placing it beyond critical scrutiny. This view, however, ignores at least two ways in which punishment may be dysfunctional and oppressive. First, as writers after Durkheim have pointed out, passionate reactions to criminalized acts may be "counter-phobic" (Garland 1990, 239; see Mead 1918). Passions that are prompted by criminal wrongdoing may be hostile and

security or misrepresentation, as well as Durkheim's brief discussion of naturalization in *Division* (Durkheim, Lukes, and Hall 2014 [1984], 118–19, 135, n 8). We thank a reviewer for pressing us on this issue.

[16] WT, [2016] IADD No 2174, at para 14.

[17] JS, [2016] IADD No 136, at para 21.

[18] HE, [2018] IADD No 647, at para 24.

disproportionate because wrongdoing threatens not only particular moral norms, but also ingrained beliefs and personality structures.[19] Further, Durkheim himself should not be read as blind to the possibility of unjustified punitive responses. Punishment would be unjustified, for instance, if it responds to the violation of a rule that is no longer "alive and active" in the *conscience collective* (Durkheim, Lukes, and Halls 2014 [1984], 87, n 45) or if it surpasses what is needed to "make disapproval [...] utterly unequivocal" (Durkheim 1961, 168). Therefore, even if the IAD's decisions do purport to serve a solidarity-enhancing role, they may still be questioned.

Second, implicit in the potential for dysfunctional punitive action is the further qualification that wrongdoing may provoke more than one kind of passionate response. Durkheim writes in a later essay, "Two Laws of Penal Evolution," that, under penal codes focused on offences against humans rather than God, collective anger at crime is "temper[ed]" by the "sympathy which we feel for every man who suffers," including the offender (Durkheim 1973, 303). Such sympathy is the product of the development of an individualistic, egalitarian morality (Lukes and Durkheim 1969, 24–25). The IAD's decisions indeed display sympathy, in the sense of responsiveness to the emotions of appellants, as well as those of victims, family members, and members of Canadian society more broadly. Members relay instances of sadness ("[S]he finds the situation her son is in to be difficult and [...] it breaks her heart"[20]), shame ("The appellant testified that he was not happy about what he did, he felt embarrassed as he was not raised that way"[21]), anger ("[T]he appellant [...] started swearing and knocked down and hit a chair in the hearing room[,] [...] telling the ID member: 'Send me back to my country, this is [expletive] bullshit'"[22]), and love ("He testified that his removal from Canada would be like tearing a limb from his family because they love him and support him"[23]). They represent, evaluate, and respond to this potentially contradictory mix of emotions while negotiating between exclusionary or inclusive responses to appellants' wrongdoings.

V. Deportation and Solidarity: The Construction of Membership

This pair of qualifications suggests a third, concerning the role of the liberal democratic state in determining the appropriate response to noncitizen offenders. Durkheim conceived of the state as being a deliberative body ("the organ of social thought": Durkheim 2019, 85), responsible for issuing collective representations on behalf of, yet distinct from, political society (Durkheim 2019, chapters 4–7). On this view, the IAD's decisions should not be read as "a mere echo" of a spontaneous collective reaction (Durkheim 2019, 100). After all, in

[19] Durkheim himself may accommodate this observation: Durkheim, Lukes, and Hall 2014 [1984], 75 ("[W]hen some cherished belief of ours is at stake we do not allow, and cannot allow, violence to be done to it with impunity").

[20] WL, [2019] IADD No 1245, at para 19.

[21] SA, [2017] IADD No 2028, at para 13.

[22] WF, [2019] IADD No 84, at para 39.

[23] SS, [2018] IADD No 1086, at para 26.

most cases, there is little to no wider public awareness of the appellants or their offences. Rather, the IAD's decisions are deliberative interventions—a series of authorial choices—by state actors seeking to impose order on a fluid and contested set of moral norms and sentiments evoked by the deportation of permanent residents for criminality. If they succeed, such interventions draw legitimacy from ideas that Canadian citizens and others have about, and sentiments they have toward, what constitutes right or wrong conduct. However, legitimacy would also come from the extent to which the decisions shape those fluid, contested, conflicting ideas and sentiments into a coherent and attractive picture: ideals of society and membership, together with a related ideal of Canadian social morality.[24] Garland helpfully refers to such representations of social morality as "compromise formation[s]" (1990, 53). They seek to reinforce beliefs whose foothold may be less than secure, but to do so they must on some level appeal to beliefs that are to some extent shared. We might expect this legitimation work to be more or less successful, depending on the audience.

The IAD's legitimation work, and the way in which it relates to the representation of appellants as members or nonmembers, may be illustrated by mapping Durkheim's typology of "mechanical" and "organic" solidarity onto four of the five factors applied by the IAD under the leading case, *Ribic*. It is well known that, following *The Division of Labour*, Durkheim mostly stopped referring to "solidarity"[25] and appeared to abandon his early claims about the emergence of organic solidarity.[26] Durkheim's early typology nonetheless provides a useful way of representing two dimensions of the relationship between the individual and social morality, as well as two different modalities of legitimating authority (Greenhouse 2011, 171, n 9). Mechanical solidarity, and what we might term mechanical membership, arises when similar social roles lead to similar psychologies (Durkheim, Lukes, and Halls 2014 [1984], 84). Mechanical solidarity, so-called because it depends on social forces akin to the "mechanical" forces that maintain the cohesion of inanimate bodies, is said to be buttressed in *Division* by a group's passionate reactions to criminal wrongdoing. The puzzle that Durkheim

[24] Durkheim held that shared ideals are essential to the maintenance of any society as such (Durkheim 1961, 13; Durkheim 1965, 93). To be clear, what emerges from the IAD's decisions is *an* ideal, not *the* ideal, of Canadian society. Nor is this the same as saying that the IAD's decisions succeed in evoking corresponding responses, since, as one reviewer noted, the IAD's decisions in general are not on the public's radar. An account of the interaction between the IAD's decisions and the Canadian public would require expanding the scope of the study to a range of other institutions, including the media (which occasionally report on the IAD's decisions) and courts (which review them).

[25] Though not entirely. As Schiermer (2014) notes, the idea, along with the idea of *conscience collective*, continues to appear in Durkheim's last major work, *The Elementary Forms of Religious Life* (1995).

[26] For discussions of the evolution of Durkheim's treatment of mechanical and organic solidarity, or of solidarity *tout court*, see (among many others) Hawkins (1979), Müller (1994), Schiermer (2014), and Paugam (2020). Hawkins, Müller, and Schiermer rightly note that Durkheim moved away from reliance on the idea of organic solidarity because he lost confidence in it. Nonetheless, some scholars continue to draw on Durkheim's conception of organic solidarity: e.g. Neuhouser (2023, 192–205). Our analysis does not depend on the viability of Durkheim's original claim in *Division* about the achievement of organic solidarity. It claims that the IAD seeks to legitimate its decisions by appealing to what might be called the organic dimension of social–moral life.

set himself in that work was how solidarity might be achieved when psychological similarity diminishes due to the increasing differentiation of social functions. Durkheim claims that, under these circumstances, the shared *conscience collective* must make room for commitments to the rules of localized social, economic, and political spheres, and, owing to decentralization, for the development of individual personality (ibid., 102; Lukes and Durkheim 1969, 25–26). Organic solidarity, and organic membership, was said to arise in *Division* through decentralized cooperative arrangements, as well as each person's commitment to the rules that were specific to their "sphere[s] of action" (ibid.). Such solidarity was said to be "organic" because it mimics the interdependence of organs and other biological components in living beings.

Durkheim suggests in *Division* that both forms of moral–social life, mechanical and organic, coexist in every society: "[T]hese two societies are really one. They are two facets of one and the same reality" (Durkheim, Lukes, and Halls 2014 [1984], 101, 146). This duality reproduces itself at the level of individual psychology: "Two consciousnesses exist within us: the one comprises only states that are personal to each one of us, characteristic of us as individuals, whilst the other comprises states that are common to the whole of society" (Durkheim, Lukes, and Halls 2014 [1984], 81; Durkheim, Lukes and Halls 2013 [1982], 63). In contemporary societies, the latter, common part of each member's psychology consists of a core set of norms that are organized around the inviolability of the individual (Lukes and Durkheim 1969, 25; Durkheim, Lukes, and Halls 2014 [1984], 134). We might point in Canada to a commitment to individualistic values, given concrete form in criminal legislation and some constitutional rights. Alongside this commitment to core norms centered on the individual are commitments to localized cooperative norms within interdependent networks of functional roles that characterize the division of labour in Canada and in its constituent communities: of a good employee or employer, of a good father or mother, a good citizen, and so on.

Durkheim's dual typology of solidarity thus suggests corresponding ideals of Canadian society and membership, combining to form an ideal of Canadian social morality. The first four *Ribic* factors track the mechanical–organic typology and, in combination, seemingly appeal to this ideal. Evaluations of the seriousness of the offence and the possibility of rehabilitation (the first two *Ribic* factors) go to whether an appellant lacks commitment to the values and norms that lie at the core of the *conscience collective.* Establishment and family or community support (the third and fourth *Ribic* factors) go to whether appellants have formed, or have the qualities that allow them to form, bonds of reciprocal interdependence. The IAD's decisions present a judgment about the appellant's membership or potential for membership in Canadian society (their ability to "lead a moral life together" with other Canadians) based on a balancing of these indicia of moral competence within the two dimensions of moral life (answering our second question from Section III: How is membership, potential membership, or nonmembership constructed in disputed cases?). In all but a small minority of cases, this assessment seems to determine whether the appellant is a proper object for humanitarian and compassionate relief, instead of humanity or compassion

(that is, for hardship) determining whether they should be given a continued chance at membership.[27]

These theoretical claims are perhaps better supported by turning to the IAD's decisions.

1. Seriousness and Rehabilitation: Mechanical Membership

When they assess seriousness, members consider whether violence was involved and any injuries that resulted; in the case of sexual offences, whether the victim was a minor and the extent of the interference with their person; in the case of drug offences, the amount involved and whether there was an intent to traffic; and so on. The IAD always evaluates an appellant's entire criminal history. Indeed, it is often difficult to discern which offence triggered the deportation process. Rather, as one appellant's counsel put it, the inquiry is into whether an appellant is "intrinsically a criminal with a propensity towards criminality."[28] On a Durkheimian interpretation, the reason for this lack of clarity is that the principal inquiry concerns the extent of the appellant's estrangement from the core commitments of what is represented as the *conscience collective*, namely the commitments to uphold the injunctions against injury to "some human interest" (Durkheim 1973, 300) that, for the most part, characterizes the offences set out in criminal legislation.

The typical pattern is for the member to provide facts related to the offence or offences committed by the appellant, then to announce the "weight" attached to them, providing a rough sense of the extent of humanitarian and compassionate considerations (i.e. the other *Ribic* factors) needed to "outweigh" such seriousness. Weight is not left as an abstract value. Rather, it is given expression by recounting the actual experience of violation: "The victim was transported to a hospital with lacerations above his hairline, a swollen left cheek and a bloody nose";[29] "The appellant assaulted a minor and made her drink alcohol. It is a predatory act";[30] "Not only did the appellant use violence in his home, where the victims should have felt safe, it is also noted that his child, who was only two months old at the time was in the home."[31] Such descriptions, on our interpretation, aim at inducing sentimental responses that nourish judgments of the challenge presented by the appellant's offending conduct to the *conscience collective.*

[27] Or, in a formulation suggested by a reviewer, moral competence carries greater relevance than humanitarian or compassionate consideration of hardship. This interpretation is supported by four cases in which appeals were allowed or stays granted even though the IAD member found that deportation "would be an inconvenience but not a hardship": YW, [2015] IADD No 1774, at para 15; VS, [2015] IADD No 807, at para 17; AJ, [2015] IADD No 1465, at para 16; RB, [2019] IADD No 1546, at para 16. Without hardship, compassion cannot be determinative of the outcome. For reasons of space, we have not analyzed the small number of cases in which relief was granted despite an apparent absence of moral competence. Such cases tended to involve severe mental illness and/or appellants who arrived in Canada as minors; see e.g. IP, [2019] IADD No 1111; TB, [2016] IADD No 856.

[28] HE, [2017] IADD No 1434, at para 25.

[29] BH, [2015] IADD No 724, at para 7.

[30] XXXX, [2017] IADD No 2141, at para 10.

[31] SR, [2018] IADD No 1220, at para 10.

If the offence provides evidence of a psychological rupture between the appellant and the core of the *conscience collective*, then rehabilitation (the second *Ribic* factor) goes to whether that rupture has been or might be mended. IAD members consider issues such as the likelihood of reoffending and consequent "risk" presented by the appellant; the "efforts" made and treatment programmes followed by the appellant; whether an appellant demonstrates "insight" into their criminal wrongdoing and takes "responsibility" for it; and whether they have shown what the member takes to be sincere "remorse" for their conduct.

Unable to treat all of these, we focus on remorse, which occupies a central role in members' decisions. Weisman follows Goffman (1972) in holding that successful displays of remorse require that a person split themself "between the self that committed the offense and the self that joins with the aggrieved party in agreeing that the act was morally unacceptable" (Weisman 2014, 9). According to the Durkheimian analysis developed here, such a split would be between a self who is a mechanical member of society and one who is not. Weisman finds that Canadian courts treat remorse as having three components (ibid., 28–38), all of which can be found in the IAD's decisions. First, remorse requires accepting responsibility without excuse, justification, or minimization. Attempts to explain away a guilty plea,[32] to partition blame,[33] or otherwise to qualify one's responsibility often lead to a finding of inauthenticity: "[T]he appellant demonstrated little remorse for his actions toward his wife. He minimized and rationalized his actions."[34] Second, remorse requires a show of suffering. However, this suffering must be other-regarding rather than oriented "inwards":[35] "I find that the appellant has not demonstrated genuine remorse for her actions but rather is remorseful for the consequences of removal she is currently facing."[36] Third, a remorseful person must make a promise of self-transformation or demonstrate that they have already undergone such self-transformation. Appellants are expected to undertake "soul searching"[37] to understand what aspects of their psychology or circumstances have led them to commit crimes, so that they may then rework those aspects. To succeed, the appellant's exercise in self-analysis must yield conclusions that accord with the IAD members' own view of their situation—that is, they must show "insight" into their difficulties with alcohol or drug abuse,[38] anger management,[39] peer pressure,[40] and so on. It must also be accompanied by sincere "efforts" at reform through treatment programmes, changing one's peer groups, or pursuing education and employment. They are, in

[32] See e.g. IK, [2017] IADD No 1878, at para 17.
[33] See e.g. TZ, [2019] IADD No 1536, at para 14.
[34] VC, [2014] IADD No 734, at para 14.
[35] HE, *supra* note 18, at para 20.
[36] NM, [2014] IADD No 735, at para 14.
[37] NA, [2020] IADD No 6, at para 22.
[38] NM, *supra* note 36, at paras 14, 19.
[39] Ibid., at para 11.
[40] JS, [2016] IADD No 136, at paras 8, 22.

other words, invited to reconstitute their subjectivity to accord with an ideal of mechanical solidarity implicit in the IAD's decisions.

2. Establishment and Family/Community Support: Organic Membership

The first and second *Ribic* factors concern mechanical membership. The seriousness of an offence and the prospects for rehabilitation indicate the extent, or lack, of psychological identity with other members of Canadian society in terms of commitment to the individualistic norms embodied in the criminal law. The third and fourth factors—establishment, including the length of time in Canada, and family or community support—identify the extent of, or the potential for, the appellant's organic membership through incorporation into the capitalist division of labour instead of reliance on various forms of social services. While these factors may be susceptible to other explanation—assessment of economic establishment obviously allows a utilitarian interpretation—a Durkheimian interpretation emphasizes that this evaluation is at the same time a moral one: that the market, the family, and other settings within a capitalist division of labour are distinct moral *milieux*, with their own distinct virtues. Uniting these virtues is the meta-virtue of self-discipline, the ability to "restrict some inclination, suppress some appetite, moderate some tendency" (Durkheim 1961, 46). An appellant's ability to find a place in these settings is therefore a mark of moral competence.

Establishment as a marker of moral competence is evaluated in a flexible way, accounting for considerations such as length of time in Canada relative to age,[41] education level, and fluency in English or French.[42] There is some indication that IAD members search for a higher degree of, or potential for, functional integration in light of the seriousness of the offence.[43] Members appear to consider not just the level of integration in economic and social networks but also whether an appellant has virtues, such as "vigour" or "dedication," that would allow such integration. Conversely, they appear to consider reliance on social entitlement schemes as evidence of the lack of such virtues.[44] Take the following pair of examples:

> The appellant has only been in Canada for seven years, which is not a particularly lengthy period of time for someone who is 43 years old. He has been gainfully employed since he has been in Canada, earns a substantial wage and has continuously paid income tax in Canada. His supervisors, past and present, wrote letters of support stating that he is a dedicated employee and has never shown any signs of aggression. [...] He does not own any real property; however he rents an apartment and provided a letter of support

[41] BH, [2015] IADD No 724, at para 28.

[42] XXXX, *supra* note 30, at para 12.

[43] See WL, *supra* note 20, at para 17.

[44] See e.g. IK, *supra* note 32, at para 30 ("After about 15 years in Canada, the appellant receives social assistance when he could be working. [...] Social services have gone to great lengths without success").

> indicating that he is considered a good tenant. The appellant testified he owns a motor vehicle in Canada, has some savings, and contributes to a pension through the Union. I find the appellant is well established in Canada.[45]

> The appellant has resided in Canada for 31 years. This is a significant period of time and I have placed a great deal of weight on this factor. [...] He has worked in steady jobs in the past, [...] it was a long time ago and more recently he has only been sporadically employed in casual, temporary positions. He has relied on government benefits for a long period of time to assist with his rent. There is little evidence of volunteer work in the community, other than helping out with some projects at the church. I find that the appellant is not very established in Canada.[46]

The IAD follows the same basic pattern in both cases. Length of time in Canada is considered, alongside relatives in Canada, employment, and whether they contribute to, or take from, the government. In the first case, the appellant's establishment is understood in terms of his ability to fulfil his role obligations as a "dedicated employee," a "good tenant," and a reliable taxpayer, who is sufficiently responsible to save and have a pension. The appellant in the second case reveals himself to be none of these things, not even someone who is willing to "volunteer" their services to the community. The time spent in Canada detracts from his claim precisely because he has not shown such competence.

Another common way of evaluating establishment in terms of competence within the capitalist division of labour is to focus on assets. Consider again two contrasting cases. The first appellant represents a model of establishment, whereas the second is far more typical of our sample:

> The appellant testified that he purchased a house, but sold it because of other opportunities. He loaned his father $60,000.00 from the sale of his house to facilitate the growing capacity of his father's construction business. The appellant owns a car, lives with his girlfriend and one brother and there is no evidence that he has any debt or has ever relied on social services.[47]

> [The appellant] does not own any real property or a motor vehicle. He has not done anything to acquire a driver's license. He lives alone in a rental suite.[48]

The IAD is not simply concerned with ownership per se. The circumstances of that ownership, and the way in which it comes to an end, are also scrutinized. So, for instance, although, in the first case above, ownership of a car is listed as a

[45] LN, [2015] IADD No 1711, at para 12.
[46] MN, [2018] IADD No 2098, at para 14.
[47] AJ, [2015] IADD No 1465, at para 12.
[48] EA, [2018] IADD No 232, at para 17.

positive factor, in another case, it was held against an appellant that he had purchased a Cadillac for $15,000 at a time when he would have had difficulty in keeping up with the payments, relying on "help from his spouse."[49] Again, it is not simply the lack of assets as such that matters, but the fecklessness that this evinces.

Finally, failure in one sphere can lead to failure in another, such as the family: "He submitted that work was a significant issue with his ex-wife, who divorced him stating that she did not need him because he was not working to take care of the family."[50] Of note, Durkheim considers the division of labour to go beyond the economic sphere, encompassing also functional roles within the affective spheres of the family and other social relationships. The ability to fulfil such roles is taken to be an important indicium of membership. Thus, a recurrent trope in negative IAD decisions (also seen above) is the spectre of the lone male: "The Appellant has been living in Canada for the past 29 years. He resides alone with his dog in an apartment in Stratford, Ontario";[51] "At present, the appellant is not involved in a romantic relationship [...] He lives alone in a rental apartment and receives a government subsidy for the rent";[52] "He lives alone in a subsidized apartment, and he does not own any property in Canada or have any savings."[53] In contrast, the ability to maintain or restore the right kinds of relationships—as a caring son or daughter,[54] an involved mother or father,[55] and so on—counts in favour of relief. Of course, the converse may also be the case.[56]

VI. Conclusion: The Legitimation of Deportation for Criminality

One way to sum up this Durkheimian interpretation is to say that IAD members, when negotiating the appropriate passionate response to an appellant's criminality, tacitly reason with something like Durkheimian ideal types of two dimensions of moral life. Consistent with this ideal-typic analysis, the IAD tends not to look behind criminal convictions; tends not to entertain the possibility that there may be reasons, beyond having committed the offence, why someone might plead guilty to a crime;[57] and, in the only explicit mention of race in our sample, seems to look askance at references to the possibility of racial injustice within the criminal justice system.[58] Through this style of analysis, the decisions

[49] PJ, [2018] IADD No 690, at para 28.

[50] HE, *supra* note 18, at para 25.

[51] JM, [2019] IADD No 1093, at para 9.

[52] MN, *supra* note 46, at para 5.

[53] PB, [2016] IADD No 1994, at para 25.

[54] GN, [2018] IADD No 1375, at para 14 ("The Appellant [...] supports and helps his mother, who has limited mobility due to back problems").

[55] IT, [2018] IADD No 1709, at para 12 ("The Appellant is an involved and caring father").

[56] See e.g. NM, *supra* note 36, at para 16 ("I find that the appellant does not have a close, if any relationship with her family in Canada").

[57] PJ, [2018] IADD No 690, at para 9.

[58] NM, *supra* note 36, at para 13. In this case, a letter from the manager of a support service for abused women wrote: "([T]he appellant) has shared with me that she was arrested five years ago as a result of a self-defence assault that she committed against her mother's boyfriend, a white Canadian

represent the Canadian migration control apparatus as capable of preventing the erosion of ideals of Canadian society, membership, and social morality—that is, of ideals that are necessary conditions for solidarity. At the same time, applications of the first four *Ribic* factors implicitly respond to concerns about the rights-limiting nature of criminal deportation by making vivid how unsuccessful appellants lack moral competence, in the sense of being neither committed to core norms and values of Canadian society nor able to integrate into its capitalist division of labour (answering the third question presented from Section III: How does the logic of membership applied by the IAD address the twin legitimation challenges arising from Canadian immigration law and policy?).

Notice, however, that as many citizens as noncitizens would fail the IAD's criteria for membership: citizens who have committed crimes, who work precariously or not at all, who cannot control their impulses, and who are generally alienated from their social world. On a pessimistic view, aligning with a conservative reading of Durkheim as a theorist of order, this sleight of hand is necessary. The discriminatory exposure of permanent residents to deportability, detention, and deportation helps to preserve a social–moral ideal that provides the basis for solidarity under the capitalist division of labour. A somewhat less pessimistic view flows from a more critical Durkheim. On this view, the questionable aspects of migration control arise from the imperative not of sustaining social morality as such, but rather of sustaining a social morality under unjust conditions. As Rawls interprets Durkheim: "[*U*]*nless and until we pay close attention to issues of justice*, [...] [s]ocial forms will fall back into mechanical solidarities" (Rawls 2003, 331, emphasis in original). Conversely, the contradiction between liberal values and the enforcement modalities of migration control may be overcome if political society strives to be "the most just, the best organized and [to possess] the best moral constitution" (Durkheim 2019, 81). On this view, resort to the practice of criminal deportation, and the need for humanitarian and compassionate relief therefrom, is symptomatic of broader social injustice, which implies that the practice may fall into disuse once justice is achieved—in other words, neither in your lifetime nor in ours.

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man. Unfortunately, as a black immigrant woman dealing with a white-male dominant criminal justice system, she could not prove the history of this incident and she was charged." Minister's counsel argued that this letter showed that the appellant had failed to take responsibility for her offence. The IAD did not comment on the minister's submission, but it found in the following sentences that the appellant was not remorseful or on a path toward rehabilitation.

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